

April 13, 2007

Via Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: WT Docket No. 06-169
Written Ex Parte

Dear Ms. Dortch:

Access Spectrum, LLC and Pegasus Communications Corporation hereby respond to the concerns about the Broadband Optimization Plan (“BOP”) raised in a letter recently submitted by MetroPCS Communications, Inc. to the Commission.¹ MetroPCS: (1) incorrectly perceives the BOP as increasing the potential for harmful interference to adjacent public safety and commercial licensees; (2) advances a statutory reading that is unnecessarily restrictive and would have the effect of undermining good public policy by preventing adoption of the BOP, the only plan in the record that would enable nationwide public safety broadband operations; and (3) mischaracterizes the BOP, apparently failing to understand that it incorporates a spectrum swap so that existing licenses maintain the same number of MHz-pops and therefore do not gain any additional spectrum. Access Spectrum and Pegasus previously have addressed many of these concerns² but elaborate on those matters here.

¹ Letter to Marlene H. Dortch, Secretary, Federal Communications Commission from Mark A. Stachiw, Senior Vice President, General Counsel and Secretary, MetroPCS Communications, Inc., WT Docket No. 06-169 (March 22, 2007) (“MetroPCS Letter”).

² *See, e.g.*, Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from Michael Gottdenker and Ruth Milkman on behalf of Access Spectrum, LLC and Marshall Pagon and Kathleen Wallman on behalf of Pegasus Communications Corporation, WT Docket Nos. 96-86, 06-150 and 06-169 (March 21, 2007) (“Access Spectrum/Pegasus March 21, 2007 Letter”) (response to AT&T); *see also* Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from Michael Gottdenker, Andrew Rein, Ruth Milkman and Kenneth Boley on behalf of Access Spectrum, LLC and Marshall Pagon, Cheryl Crate, and Kathleen Wallman on behalf of Pegasus Communications Corporation, WT Docket No. 06-169 (Feb. 28, 2007) (“Access Spectrum/Pegasus Feb. 28, 2007 Letter”) (response to Verizon Wireless); Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from Michael Gottdenker and Ruth Milkman on behalf of Access Spectrum, LLC and Marshall Pagon and Kathleen Wallman on behalf of Pegasus Communications Corporation, WT Docket Nos. 96-86, 06-150 and 06-169 (March 30, 2007) (response to Ericsson); *see also* Reply Comments of Access Spectrum, LLC and Pegasus Communications Corporation, WT Docket Nos. 96-86 and 06-169 (Nov. 13, 2006) (“Access Spectrum/Pegasus Nov. 13, 2006 Reply Comments”).

Interference Issues

MetroPCS correctly observes that the 700 MHz guard bands were designed to protect public safety communications from harmful interference³ and properly asserts that any entity seeking to change the original band plan and service rules bears the burden of showing that the changes will not cause harmful interference to adjacent licensees.⁴ Access Spectrum and Pegasus agree, which is why they participated in the Technical Working Group, along with public safety representatives, manufacturers, and other commercial entities. The Second TWG Report concluded that the “implementation of the BOP would have a net decreasing effect on the risk of intermodulation interference to public safety narrowband operations”⁵ and “there are no technical issues remaining that would prevent the adoption of the BOP by the FCC.”⁶ As a result, the vast majority of the public safety community supports the BOP.⁷ For example, the National Public Safety Telecommunications Council stated in the record that the BOP “offers a relative improvement to public safety with regard to interference; we discern no increased challenges to commercial operations. . . . We disagree . . . that the proposal itself increases interference potential for either public safety or commercial operations.”⁸ The guard bands were

³ MetroPCS Letter at 2.

⁴ *Id.* at n.8.

⁵ Second Report of the 700 MHz Technical Working Group, transmitted via letter from Ruth Milkman, Counsel for Access Spectrum, LLC and Kathleen Wallman, Adviser to Pegasus Communications Corporation, WT Docket Nos. 06-169 and 96-86 at 2, 7 (Jan. 26, 2007) (“*Second TWG Report*”).

⁶ *Id.* at 8.

⁷ See, e.g., Letter to Fred Campbell, Chief, Wireless Telecommunications Bureau, Federal Communications Commission from Wanda McCarley on behalf of the Association of Public-Safety Communications Officials-International, Alan Caldwell on behalf of the International Association of Fire Chiefs, and Harlin McEwen on behalf of the International Association of Chiefs of Police, the Major Cities Chiefs Association, the Major County Sheriffs’ Association and the National Sheriffs’ Association, WT Docket Nos. 96-86 and 06-169 (March 8, 2007) (“APCO, IAFC, IACP, *et al.* March 8, 2007 Letter”); see also Letter to Marlene H. Dortch, Secretary, Federal Communications Commission from Vincent R. Stile, Chair, National Public Safety Telecommunications Council, WT Docket Nos. 96-86, 06-150 and 06-169 and PS Docket No. 06-229, at 3 and n.1 (Feb. 23, 2007) (NPSTC Feb. 23, 2007 Letter); see also Letter to Fred Campbell, Chief, Wireless Telecommunications Bureau, Federal Communications Commission from Vincent R. Stile, Chair, National Public Safety Telecommunications Council, WT Docket Nos. 96-86, 06-150 and 06-169 and PS Docket No. 06-229 (March 14, 2007); see also Letter to Marlene H. Dortch, Secretary, Federal Communications Commission from Chief Peter Meade, FCC Region 8 700/800 Regional Planning Committee Chair, Captain Joseph Grube, FCC Region 55 700/800 Regional Planning Committee Chair, David Cook, FCC Region 30 700/800 Regional Planning Committee Chair and Hanford Thomas, Director New York State Statewide Wireless Network Program, WT Docket No. 96-86 (March 28, 2007).

⁸ NPSTC Feb. 23, 2007 Letter at 2.

put in place to protect public safety communications and the public safety community supports making changes to the guard band rules.

MetroPCS does not contribute any technical analysis to the discussion of potential interference. Instead, it simply refers to the concerns about the prospects for harmful interference raised by AT&T and Verizon Wireless and urges the Commission to give them serious consideration and weight.⁹ MetroPCS ignores the considerable technical analysis contained in the First Report and Second Report of the 700 MHz Technical Working Group¹⁰ and fails entirely to address Access Spectrum and Pegasus' extensive submissions which comprehensively address the interference concerns of Verizon Wireless and AT&T.¹¹ MetroPCS raises no new interference concerns that have not already been analyzed and conclusively dismissed by proponents of the BOP, including the public safety community.

In lieu of any meaningful technical discussion, MetroPCS instead urges giving greater weight to the comments of Verizon Wireless and AT&T because they "appear to have no axe to grind in this proceeding" other than avoidance of interference.¹² It is unlikely in the extreme, however, that the motives of Verizon Wireless and AT&T are as purely altruistic as MetroPCS suggests. This is confirmed by their failure to engage in a constructive manner with proponents of the BOP, particularly the public safety community, despite repeated private and public entreaties to do so.¹³ The BOP, *inter alia*, reconfigures the band to promote public-private partnerships, provides Public Safety with an additional 3 MHz of spectrum, and makes an additional 3 MHz of spectrum available for commercial broadband operations. Moreover, it makes possible plans like those proposed by The Coalition for 4G in America¹⁴ and Frontline Wireless.¹⁵ These features are attractive to new entrants. As such, the BOP is supported by a vast array of commercial and consumer interests that are focused on increased broadband

⁹ MetroPCS Letter at 2.

¹⁰ Report of the 700 MHz Technical Working Group, transmitted via letter from Ruth Milkman, Counsel for Access Spectrum, LLC and Kathleen Wallman, Adviser to Pegasus Communications Corporation, WT Docket Nos. 06-169 and 96-86 (Oct. 23, 2006) ("*First TWG Report*"); *Second TWG Report* at 2.

¹¹ See generally Access Spectrum/Pegasus March 21, 2007 Letter and Access Spectrum/Pegasus Feb. 28, 2007 Letter, *supra* n.2.

¹² MetroPCS Letter at 2.

¹³ See, e.g., Access Spectrum/Pegasus Nov. 13, 2006 Reply Comments at 16.

¹⁴ See "The Coalition for 4G in America: Optimizing the 700 MHz Band for Next Generation Technologies and Networks" filed as an attachment to a Letter to Marlene H. Dortch, Secretary, Federal Communications Commission from Ruth Milkman, Counsel to Access Spectrum, LLC, WT Docket Nos. 96-98, 06-150 and 06-169 (March 6, 2007).

¹⁵ See Comments of Frontline Wireless, LLC, PS Docket No. 06-229 and WT Docket No. 96-86 (filed Feb. 26, 2007).

competition, new entry, 4G technologies, and public-private partnerships.¹⁶ As Access Spectrum and Pegasus have stated:

The possibility of public-private partnerships is likely to be particularly attractive to new entrants, who will likely value the possibility of Public Safety serving as a new, stable and well-paying customer base, thereby enabling the commercial entity to place a higher bid for the commercial spectrum at auction. As a result, the BOP's promotion of such partnerships could provide an additional and important incentive to new operators to enter and compete in the market against Verizon Wireless and other incumbents.¹⁷

Moreover, the Commission's attention is properly focused on the technical merits of, not the purported motives behind, the arguments that it receives. Therefore, the BOP should be adopted on the basis of its technical and public policy merits and the unfounded interference concerns of AT&T, Verizon Wireless and MetroPCS should be dismissed.

Compliance with the Statutory Scheme

Access Spectrum and Pegasus have explained that the BOP is the only plan in the record that would fulfill the Commission's obligation to manage spectrum in a way that promotes the safety of life and property,¹⁸ and that it is fully consistent with the Communications Act.¹⁹ The public safety community has embraced this analysis.²⁰ In short, Section 337 requires the Commission, by January 1, 1998, to allocate 36 MHz of spectrum to commercial use for assignment by competitive bidding and 24 MHz of spectrum to public safety use (assignment of

¹⁶ The following commercial and consumer entities support the BOP: Arcadian Networks, Consumer Federation of America, Consumers Union, DirecTV, EchoStar, Free Press, Google, Intel, Media Access Project, Motorola, New America Foundation, Northrop-Grumman, Public Knowledge, SDR Forum, Skype, WiMAX Forum, and Yahoo!.

¹⁷ Access Spectrum/Pegasus Feb. 28, 2007 Letter at 15.

¹⁸ 47 U.S.C. § 151.

¹⁹ See, e.g., Access Spectrum/Pegasus March 21, 2007 Letter at 4-7; Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from Ruth Milkman on behalf of Access Spectrum, LLC and Kathleen Wallman on behalf of Pegasus Communications Corporation, WT Docket Nos. 96-86 and 06-169 (March 2, 2007) ("Access Spectrum/Pegasus March 2 Letter"); Letter to Marlene H. Dortch, Secretary, Federal Communications Commission from Ruth Milkman, counsel to Access Spectrum, LLC and Kathleen Wallman, Adviser to Pegasus Communications Corporation, WT Docket Nos. 96-86, 06-150, 06-169 (Dec. 12, 2006) ("Access Spectrum/Pegasus Dec. 12, 2006 Letter").

²⁰ See APCO, IAFC, IACP, *et al.* March 8, 2007 Letter, *supra* n.7.

which must commence by September 30, 1998).²¹ Access Spectrum and Pegasus have explained that the Commission already allocated the Upper 700 MHz A and B Blocks to commercial use and assigned them by competitive bidding.²² Reallocating a portion of the B Block to public safety use would not change the fundamental (and critical) fact that upon completion of the Upper 700 MHz auction, the Commission will have made 36 MHz of spectrum available for commercial use by competitive bidding – 6 MHz of it in 2000-2001 and the remaining 30 MHz in 2007-2008.

Metro PCS misrepresents Access Spectrum and Pegasus' position as standing for the proposition that mere allocation is an end in itself and there is no need to permit actual use in accordance with section 337's allocation directives. Access Spectrum and Pegasus previously have emphasized that they do not advance a theory in which allocation is made for allocation's sake; the B Block has been available for commercial use since it was assigned over six years ago. However, changes in technology and public safety's emergent broadband needs during the intervening period of time now support re-purposing of this spectrum pursuant to the Commission's broad spectrum management authority.²³

Windfall Allegations

The BOP would change the service rules for the A and B Blocks to increase public safety benefits and promote more efficient use of the spectrum.²⁴ MetroPCS opposes the modified service rules, arguing that they would provide a windfall to the existing A and B Block licensees.²⁵ MetroPCS claims that post-auction rule changes encourage speculators and hinder the efficient assignment operations of auctions.²⁶ The Commission's role as manager of spectrum requires it to acknowledge changes in technology and the likely use of spectrum, and to alter its rules where necessary to serve the public interest, regardless of whether those rule changes occur pre- or post-auction.²⁷ MetroPCS's blanket opposition to post-auction rule

²¹ 47 U.S.C. §§ 337(a) and (b).

²² See, e.g., Access Spectrum/Pegasus March 2 Letter at 5-6; Access Spectrum/Pegasus Dec. 12, 2006 Letter at 4-5; Access Spectrum/Pegasus March 21, 2007 Letter at 4; Access Spectrum/Pegasus Nov. 13, 2006 Reply Comments at 20-21.

²³ See Access Spectrum/Pegasus March 21, 2007 Letter at 5.

²⁴ Comments of Access Spectrum, L.L.C., Columbia Capital III, LLC, Intel Corporation, and Pegasus Communications Corporation, WT Docket No. 96-86 (June 6, 2006); Comments of Access Spectrum, LLC and Pegasus Communications Corporation, WT Docket Nos. 96-86 and 06-169 at 9-14 (Oct. 23, 2006) ("Access Spectrum/Pegasus Oct. 23, 2006 Comments").

²⁵ MetroPCS Letter at 3-4.

²⁶ *Id.* at 3.

²⁷ See *FCC v. Midwest Video Corp.*, 440 U.S. 689, 696 (1979) ("[I]t is clear that Congress meant to confer 'broad authority' on the Commission . . . so as 'to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission.'") (quoting *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940)).

changes would prevent modifications that would accomplish important statutory goals or that would address technological changes (such as the emergence of broadband) that may have been unknown at the time of the auction. Indeed, post-auction rule changes are not uncommon.²⁸ Rule changes are appropriately adopted where, as with the BOP, they would generate public interest benefits and accomplish statutory objectives. The drastic measure recommended by MetroPCS (requiring the surrender and re-auction of licenses or the payment of a windfall tax whenever rule changes allow more efficient use of the spectrum) would undermine the Commission's licensing scheme by interfering with the ability of licensees to rely on the use of the spectrum for the length of the term, absent extraordinary circumstances. It also would discourage spectrum licensees from pursuing any FCC proceeding designed to update spectrum use with changes in technology. This clearly would not be in the public interest.

MetroPCS asserts that "post-licensing regulatory changes that result in a significant financial benefit to a particular licensee or group of licensees are not to be favored."²⁹ MetroPCS is imprecise in its formulation, for it is not the post-licensing regulatory changes themselves that are disfavored; it is the resulting windfall to the beneficiaries that the Commission seeks to prevent. Contrary to MetroPCS's assertions, though, the rule changes proposed by the BOP would not create a "significant windfall"³⁰ for guard band licensees, nor would the BOP give guard band licensees any more spectrum (measured on a MHz-pops basis) than they currently hold.

First, the BOP would not "give each A Block Guard Band licensee another 1 MHz of spectrum," as MetroPCS erroneously claims.³¹ To accomplish the reconfiguration, Access

²⁸ See, e.g., *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Services*; *2000 Biennial Regulatory Review Spectrum Aggregation Limits For Commercial Mobile Radio Services*; *Increasing Flexibility To Promote Access to and the Efficient and Intensive Use of Spectrum and the Widespread Deployment of Wireless Services, and To Facilitate Capital Formation*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 19078 (2004) (increasing power limits for cellular, broadband PCS and AWS licensees in rural areas); *Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions*, Report and Order, 13 FCC Rcd 19112 (1998) (allowing MDS licensees to offer more flexible, two-way fixed broadband wireless applications rather than strictly multi-channel video); *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*; *Amendment of the U.S. Table of Frequency Allocations to Designate the 2500-2520/2670-2690 MHz Frequency Bands for the Mobile-Satellite Service*, First Report and Order and Memorandum Opinion and Order, 16 FCC Rcd 17222 (2001) (adding a mobile allocation to the 2500-2690 MHz band in order to provide added flexibility and increase efficiency).

²⁹ MetroPCS Letter at 4.

³⁰ *Id.* at 4.

³¹ *Id.* at 3.

Spectrum and Pegasus have proposed a spectrum swap, in which they and the other existing commercial licensees would turn in all of the B Block licenses as well as some A Block licenses so that they end with approximately the same number of MHz-pops that they held before the swap.³² The commercial licensees would end with 1.5 MHz pairs in a portion of the country. The remaining 1.5 MHz pairs would be auctioned by the Commission. Second, Access Spectrum and Pegasus, along with the other A and B Block licensees, acquired their spectrum at auction, paying over \$200 million. Third, in addition to returning some of their existing licenses, Access Spectrum and Pegasus have committed to paying the costs of (1) converting existing public safety narrowband systems and (2) making changes to CAPRAD provided that all of the key provisions of the BOP are implemented.³³ Finally, the rule changes are intended to make the spectrum more useful for both commercial and public safety operations. It would be counterintuitive to refuse to implement a plan that involves such considerable benefits for so many just because it provides a corollary benefit to existing guard band licensees.

Pursuant to the Commission's rules, this letter is being submitted for inclusion in the public record in the above-referenced proceedings.

Sincerely,

/s/ Ruth Milkman

Ruth Milkman

Lawler, Metzger, Milkman & Keeney, LLC

2001 K Street NW, Suite 802

Washington, DC 20006

(202) 777-7700

Counsel to Access Spectrum, LLC

/s/ Kathleen Wallman

Kathleen Wallman

Wallman Consulting, LLC

9332 Ramey Lane

Great Falls, VA 22066

(202) 641-5387

Adviser to Pegasus Communications Corporation

Michael I. Gottdenker

Chairman and CEO

Access Spectrum, LLC

2 Bethesda Metro Center

Bethesda, MD 20814-6319

Marshall W. Pagon

Chairman and CEO

Pegasus Communications Corporation

225 City Avenue, Suite 200

Bala Cynwyd, PA 19004

cc: Matthew Berry
John Branscome
Fred Campbell
Jeff Cohen
Paul D'Ari

Samuel Feder
Angela Giancarlo
Aaron Goldberger
Bruce Gottlieb
David Horowitz

Cathleen Massey
Barry Ohlson
Erika Olsen
James Schlichting
Dana Shaffer

³² See Access Spectrum/Pegasus March 21, 2007 Letter at 6-7.

³³ See Access Spectrum/Pegasus Oct. 23, 2006 Comments at 16.